85-181

No. ———

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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COLLINS COMPANY, INC., a/k/a THE COLLINS COMPANY, INC. OF DELAWARE, CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC. and ALGERNON BLAIR, INC.,
*Petitioners,*

v.

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED

A disappointed low bidder in a federal procurement, set aside for "small businesses," as defined in 15 U.S.C. § 631, *et seq.* and implementing regulations, filed a diversity action under state common law theories for loss of profits and punitive damages against the successful bidder for allegedly misrepresenting its size where, under federal procurement and SBA regulations, the successful bidder was conclusively presumed to be a "small business" for that particular procurement. Finding that this federal regulatory scheme preempted such state common law causes of action, the district court dismissed the action. The court of appeals reversed, finding that there is no federal preemption of such causes of action. The questions presented are twin aspects of the central issue of federal preemption, to-wit:

1. Whether permitting state courts (and federal courts in diversity cases) to decide de novo whether a successful bidder on a particular procurement is a "small business" under applicable federal law and regulations frustrates the SBA's size determination process.

2. Whether permitting state common law claims for damages, based upon allegations that a successful bidder was not a "small business" for purposes of the federal small business set aside program and that such bidder had incorrectly certified itself as such, frustrates the federal procurement process.

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COLLINS COMPANY, INC., a/k/a THE COLLINS COMPANY, INC. OF DELAWARE, CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC. and ALGERNON BLAIR, INC.,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

The petitioners Collins Company, Inc., a/k/a The Collins Company, Inc. of Delaware, Castle Construction Company, Inc., a/k/a Alabama Castle Construction Company, Inc. and Algernon Blair, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in these proceedings on February 21, 1985.

## OPINIONS BELOW

The opinion of the court of appeals reversing the judgment of the district court and remanding for further proceedings is reported at 753 F.2d 957 (11th Cir. 1985).

The opinion and the judgment thereon are attached hereto as Appendices A and E, respectively.

The opinion and judgment of the district court are unreported and are attached hereto as Appendices C and D, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on February 21, 1985 (see Appendix E), and a timely petition for rehearing and suggestion for rehearing en banc was denied on May 7, 1985, said denial being attached hereto as Appendix F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. U.S. Const. art. VI, cl. 2. (Appendix G)
2. 5 U.S.C. § 706(2)(a) (1982 ed.) (Appendix H)
3. 15 U.S.C. § 633(a) (1982 ed.) (Appendix H)
4. 15 U.S.C. § 634(b)(6) (1982 ed.) (Appendix H)
5. 15 U.S.C. § 644(a) (1982 ed.) (Appendix H)
6. 13 C.F.R. §§ 121.8-121.11 (1985) (Appendix I)

## STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 (diversity and amount in controversy). In this action, Respondents Tectonics, Inc. of Florida and Forest Builders, Inc. ("Tectonics"), the unsuccessful second low bidder on a federal procurement at Redstone Arsenal set aside for "small businesses," charged Petitioner Collins Company, Inc., ("Collins"), the successful low bidder, and Petitioners Castle Construction Company, Inc. ("Castle") and Algernon Blair, Inc., ("Blair") with fraud and deceit, unjust enrichment, and interference with a business relationship, all under state common law theories, claiming loss of profits and punitive damages (R.

1-12). Tectonics' claim was based on its assertion that in March of 1978, Collins had misrepresented itself as a "small business" in bidding this particular procurement. In their bids, both Tectonics and Collins had certified themselves to be "small businesses" pursuant to SBA regulations. When Collins was awarded the contract, Tectonics did not file a bid protest or seek injunctive relief in federal court.

In May of 1978, as a result of a protest filed by another company regarding a different, later federal procurement, the SBA determined that Collins was not a "small business" for the purpose of that procurement and future procurements only. (R. 11-12). Collins did not appeal the determination. Based on this determination and the decision of *Iconco v. Jensen Construction Co.*, 622 F.2d 1291 (8th Cir. 1980), which held that an unsuccessful second low bidder on a federal procurement could assert state law claims against a successful bidder for misrepresentations in its bid as to its size status, Tectonics filed its action in district court. (R. 1-12)

Petitioners Collins, Castle and Blair filed a motion to dismiss the action, which the district court granted (Appendix D) essentially on the ground that any state common law action was preempted by federal law. (Appendix C). The Eleventh Circuit Court of Appeals, in a split decision, reversed the district court's judgment and remanded the case for further proceedings. (Appendix E). In its opinion (Appendix A), the court of appeals embraced the position of the Eighth Circuit Court of Appeals in *Iconco* that there is no federal preemption in this area and rejected the conflicting position of the Ninth Circuit Court of Appeals in *Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974) that private causes of action would frustrate the federal procurement scheme. The court of appeals further relied heavily on this Court's recent federal preemption analysis in *Silkwood v. Kerr-McGee*, —— U.S. ——, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

Collins', Castle's and Blair's petition for rehearing and suggestion for rehearing *en banc* was denied (Appendix F).

## REASONS FOR GRANTING THE WRIT

### I. Interference with Effective Administration of the Small Business Set Aside Program

As this Court recently noted in *Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), "state law can be preempted in either of two general ways." Either Congress evidences an intent to do so or, even if such an intent is not discernible, state law is still preempted to the extent that it conflicts with or frustrates the federal law. *Id.* at 452. The circuit courts of appeal which have passed upon this issue with regard to the enactment of the Small Business Act, 15 U.S.C. §§ 631, et seq., have all agreed that Congress was notably silent with regard to whether it intended to prohibit or preserve state causes of action for false certification of size status. See *Tectonics, Inc. of Florida v. Castle Construction Co.*, 753 F.2d 957 (11th Cir. 1985); *Iconco v. Jensen Construction Co.*, 622 F.2d 1291 (8th Cir. 1980). Consequently, the central issue in this case is whether the federal regulatory scheme for the small business set aside program is frustrated by the state cause of action for damages which Tectonics seeks. Briefly stated, can the Small Business Administration ("SBA") continue to effectively administer the program while state causes of action question SBA decisions and interpret the various standards which it promulgates and enforces? This Court has repeatedly recognized as "important questions of federal law", justifying review, those issues relating to the effective administration and enforcement of federal laws and regulations. See, *e.g.*, *Donaldson v. United States*, 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971) (federal revenue laws); *United States v. Article of Drug* *** *Bacto-Unidisk*, 394 U.S. 794, 89 S.Ct. 1410, 22 L.Ed.2d 726, *reh'g denied*, 395

U.S. 954, 89 S.Ct. 2013, 23 L.Ed.2d 473 (1969) (Federal Food, Drug, and Cosmetic Act). More specifically, this Court has held repeatedly that the question of preemption of state court remedies by federal laws and regulations is important enough to grant a writ of certiorari, most recently in *Silkwood*, 78 L.Ed.2d at 452 ("The issue addressed by the Court below is important; it affects both the states' traditional authority to provide tort remedies to its citizens and the federal government's expressed desire to maintain exclusive regulatory authority over the safety aspects of nuclear power.")[1]

The court of appeals failed to recognize the havoc Tectonics' cause of action would wreak on the effective administration of the small business set aside program and, in so doing, misconceived the meaning of this Court's recent federal preemption decision of *Silkwood*.[2] As

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[1] See, *e.g.*, *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (Certiorari granted to review whether the National Labor Relations Act, as amended, preempts a state tort action against a union for damages for intentional infliction of emotional distress); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879, 40 L.Ed.2d 315 (1974) (Certiorari granted to resolve conflict in courts of appeals over whether federal patent law preempts state trade secret action for damages); and *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973) (Certiorari granted because of the significance of federal-state relations and the question of whether New York Stock Exchange regulations preempted an employee's avenues of wage relief under state law.)

Although the court of appeals in the instant case reversed the district court's order dismissing the action and remanded the case for further proceedings, an important and clear cut issue such as federal preemption, which is fundamental to the further conduct of the case, merits review by this Court despite the arguably interlocutory status of the case. See, *e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

[2] In *Wilkinson v. U.S.*, 365 U.S. 399, 81 S.Ct. 567, 5 L.Ed.2d 633, *reh'g denied*, 365 U.S. 890, 81 S.Ct. 1024, 6 L.Ed.2d 200 (1961), this

fully outlined in *Mid-West Construction, Ltd. v. United States*, 387 F.2d 957, 959-960 (Ct.Cl. 1968), two sets of interconnected federal regulations, SBA Regulations and Federal Procurement Regulations, have been promulgated to provide an elaborate administrative procedure for determining and challenging the small business status of a bidder on a federal procurement. In light of the elaborate administrative procedures for implementing the small business set aside program, the court of appeals overlooked the critical fact that Tectonics' action will require the district court (sitting as a state court applying federal regulations) to undertake its own, de novo determination of whether Collins was a "small business" under SBA regulations at the time of the procurement in question. As discussed below, the SBA deemed Collins a "small business" for purposes of this procurement. This plainly contradicts and frustrates the scheme for federal determinations of size status, undermining effective, uniform administration of the small business set aside program.

The task of determining whether a business is a "small business" for purposes of procurement set asides lies in the first instance with the SBA. 15 U.S.C. § 631, *et seq.* As noted in *Otis Steel Products Corp. v. United States*, 316 F.2d 937, 938-939 (Ct.Cl. 1963):

> The Small Business Act of 1953, as amended, 67 Stat. 232, 15 U.S.C. § 631 et seq. (1958 ed.), was designed to set aside certain contracts for the benefit of small business concerns. Such a concern was defined in the Act only in general terms, the detailed definition thereof being left to the Administrator of the Small Business Administration, which was created by the Act.

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Court granted certiorari to consider petitioner's claim that the court of appeals had misconceived the meaning of a United States Supreme Court decision which it found "controlling."

This is properly so because the interpretation of the SBA's size regulations "obviously incorporates quasi-technical administrative expertise and a familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme . . . ." *Allen M. Campbell Co. Gen. Con., Inc. v. Lloyd Wood Const. Co.*, 446 F.2d 261, 265 (5th Cir. 1971). Thus, "judges should be particularly reluctant to substitute their personal assessment of the meaning of a regulation for the considered judgment of the agency." [Footnote omitted] *Id.*

In the instant case, there was no formal agency review of whether Collins was a "small business" for purposes of the procurement on which Tectonics was the second low bidder since the award was not protested. There was, however, a self certification of "small business" status by Collins which, under SBA regulations, created a conclusive presumption of such status in the absence of timely protest. See *Mid-West Construction, Ltd. v. United States*, 387 F.2d 957 (Ct.Cl. 1968). This conclusive presumption applies even if Collins was not in fact a "small business" at the time of the procurement on which Tectonics was the second low bidder. *Id.* The determination by the SBA that Collins was not a "small business" on the later procurement was prospective only and has no bearing on the present cause of action. *Id.*

If the district court in this diversity case (in another case it may be a state court) is permitted to entertain the purported state cause of action, it must do at least two things, both of which violate the federal regulatory scheme and the clear federal preemption in this area. First, it must disregard the unprotested self certification which created a conclusive presumption of "small business" status under the very federal scheme upon which Tectonics pegs its cause of action. Second, in complete derogation of the SBA's authority to interpret and enforce its own regulations, the Court must consider

de novo whether Collins' condition at the time of the procurement in question met the federal regulatory standards for a "small business".

In making such a determination, the district court would be interpreting and applying federal law and SBA regulations, the prerogative of the SBA which is only subject to review for arbitrariness, capriciousness and/or abuse of discretion under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A). Not only would the district court be ill equipped to do this, but it would also be invading the federal government's administrative and regulatory scheme. If all state courts and all federal courts in diversity cases had this authority, a uniform interpretation of these federal regulations would be lost. Their decisions might well conflict with the SBA's own determinations and policies. Although it appears that the court of appeals has not contemplated these results of its decision, clearly, Congress did not intend such results. At the least, they "would frustrate the objectives of the federal law". *Silkwood*, 78 L.Ed.2d at 458.

A critic of the *Iconco* decision, which the court of appeals followed, reached a similar conclusion:

> By definition the federal procurement scheme is exclusively federal. The system must remain exclusively federal to maintain a uniform character. '[C]onstruction of the procurement provisions is a matter of federal, not state, law.' The *Iconco* decision allows each state to mold the federal procurement process according to its own common law doctrine. Divergent state adjudications impeding the efficient administration of federal procurement will result. If the more than 90 district courts are allowed to interpret different state common law doctrines according to the SBA's standards, the certainty and uniformity engendered by the present federal procurement scheme will vanish.

Case Comment, *Government Contracts—States are Free to Look to the Small Business Act as a Standard in*

*Determining Whether a Successful Bidder for a Set-Aside Contract Committed Fraud or was Unjustly Enriched at the Expense of an Unsuccessful Bidder—Iconco v. Jensen Construction Co., 622 F.2d 1291 (8th Cir. 1980)*, 56 Notre Dame Law. 567, 571 (1981) [Footnotes omitted]. As noted in this article, the availability of a state remedy further "furnishes an 'irresistible disincentive' to an unsuccessful bidder's pursuing administrative remedies in a timely manner." *Id* at 571, 572. In fact, unsuccessful bidders would be motivated to forego administrative remedies altogether, wait until the contract is performed, and then seek their lost profits and punitive damages in court, the recovery of which are not allowed in administrative remedies. This would further create windfall profits for unsuccessful bidders since the successful plaintiff would not only reap the profits from the challenged contract, but also the normal profits obtained from other work it could perform during the performance of the challenged contract by someone else. *Id.* The entire fabric of the small business set aside program would unravel to the detriment of all its participants.

Not only does this case involve an "important question of federal law" in its far reaching effects on those who administer and participate in the small business set aside program, but it involves the application of federal preemption principles by the court of appeals which directly contradict those controlling principles espoused by this Court, another reason for granting review. Sup. Ct. R. 17(1)(c). The source of the federal preemption doctrine is the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI Cl. 2. As noted in *Mayo v. United States*, 319 U.S. 441, 63 S.Ct. 1137, 87 L.Ed. 1504, 1507 (1943) [Emphasis added]:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is neces-

> sary for uniformity that the laws of the United States be dominant over those of any state. *Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements.* The supremacy clause of the Constitution states this essential principle. Article 6. A corollary to this principle is that the activities of the federal government are free from regulation by any state.

Federal regulations have no less preemptive effect than federal statutes and, where Congress has committed to an agency's domain the discretion to balance conflicting policies, a "reasonable accommodation" of those policies should not be disturbed by state law. See, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. ——, 104 S.Ct. 2694, 81 L.Ed.2d 580, 589 (1984).

The SBA was created to carry out the policies of the Small Business Act and it was given full authority to make such rules and regulations as it deemed necessary to carry out its authority. 15 U.S.C. §§ 633(a) and 634(b)(6). Most importantly, the SBA, along with the particular procuring agency involved, was given full authority to balance the competing interests of promoting small business concerns and preserving "the interest of war or national defense programs." 15 U.S.C. § 644(a). As explained in *Mid-West Construction Company, Ltd. v. United States*, 387 F.2d 957, 963 (Ct.Cl. 1968):

> But those who administer the Act have plainly decided that the Congressional policy favoring small business was not expected to be enforced to the exclusion of all other interests. Witness the regulations accepting self-certification where no protest, a late protest, or a late appeal is filed, . . . . Congress must be taken to have anticipated that general procurement interests would be given their place.

The court of appeal's failure to recognize the authority given the SBA to balance competing policies and the

preemptive effect thereof contradicts the analysis of this Court in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile, Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). In this decision, this Court held that the Interstate Commerce Act and the implementing regulations effectively preempted a shipper's state cause of action for damages against a regulated rail carrier who sought and obtained approval from the Interstate Commerce Commission to abandon a railroad line. The Court noted that Congress had granted the Interstate Commerce Commission broad power to regulate abandonment of railroad lines and that such authority was "critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce." 67 L.Ed.2d at 266, 267. The Court further noted that the Commission must be able to balance the competing interests of the carrier and the transportation system in its decisions on abandonment and that such discretion granted to the Commission suggested a Congressional intent to limit judicial interference with the Commission's activities. 67 L.Ed.2d at 258, 259. Also noted were the elaborate administrative remedies made available to the injured shipper who objects to an abandonment, much like the size protest remedies available to a disappointed low bidder. In finding that the decision below allowing a state cause of action was wrong, the Court reasoned:

> The decision amounts to a holding that a state can impose sanctions upon a regulated carrier for doing that which only the Commission, acting pursuant to the will of Congress, has the power to declare unlawful or unreasonable. * * * It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission.

67 L.Ed.2d at 269.

The Court further noted that the allowance of such a state cause of action would "permit the state of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse." 67 L.Ed.2d at 270. "A system under which each state could, through its courts, impose on railroad carriers its own version of reasonable service requirements could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." *Id.* The Court also observed that the questions which the shipper attempted to raise in the state court were "precisely the sorts of concerns that Congress intended the Commission to address in weighing abandonment requests from the carriers subject to its regulation." 67 L.Ed.2d at 271.[3] In short, the Court determined that the question of abandonment and the competing interests involved had been committed by Congress to the sole administrative judgment of the Commission, which effectively preempted any state cause of action that might question or interpret such administrative concerns.

Similarly, in the instant case, Congress has given full authority to the Small Business Administration to determine what is a "small business" and to balance the competing interests of promoting small businesses and preserving efficient and speedy federal procurement and a ready, national defense. The SBA has done so by providing certain procedures for protesting self-certifications of size within a time framework which preserves speedy and certain federal procurement. 13 C.F.R. §§ 121.8-121.11. Like the shipper in *Chicago and Northwestern Transportation Co.*, Tectonics had administrative remedies, but failed to properly utilize them. 67 L.Ed.2d at 273, 274. As concluded in *Chicago and Northwestern Transportation Co.*:

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[3] Cf. *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (No interference with the federal, labor regulatory scheme where state tort action can be adjudicated without resolution of the merits of the underlying labor dispute.)

> The Act creates no other express remedies for a shipper who is damaged by a carrier's abandonment of a line. In particular, nothing in the Act suggests that Congress contemplated permitting a shipper to bring a civil damages action in state court. And such a right to sue, with its implied threat of sanction for failure to comply with what the courts of each State consider reasonable policies, is plainly contrary to the purposes of the Act. We are thus not free to assume that it has been preserved.

67 L. Ed. 2d at 274.

See *Garner v. Teamsters, C. & H. Union*, 347 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953) (In an analysis very similar to that of *Chicago and Northwestern Transportation Co.*, the *Garner* court held that the National Labor Management Relations Act and its implementing regulations preempted a state court's injunction of union conduct as violative of state labor law.)

Rather than follow this Court's controlling analysis in *Chicago and Northwestern Transportation Co.*, the court of appeals erroneously applied and interpreted this Court's decision in *Silkwood*, a more recent federal preemption decision but one which does not apply. *Silkwood* involved a state common law tort action by the estate of a worker exposed to radiation against the worker's employer, the central issue being whether the federal regulatory scheme over the safety aspects of nuclear power preempted such a cause of action. In weighing whether the federal scheme under the Small Business Act and federal procurement regulations would be frustrated by allowance of Tectonics' state cause of action, the court of appeals saw "no difference in a bidder who has been deprived of a contract through the fraud of a non-eligible company having a cause of action than Mrs. Silkwood's estate having a cause of action to recover for punitive damages . . . ." *Tectonics, Inc. v. Castle Construction Co.*, 753 F.2d 957, 963 n.5 (11th Cir. 1985). In truth, the

differences between the instant case and *Silkwood* are significant. First, a jury determination of common law negligence in the *Silkwood* case involves no review or interpretation of the federal nuclear safety standards. The Plaintiff estate in *Silkwood* was not seeking to make a violation of a federal regulation into a private cause of action. The wrong sued upon in *Silkwood*—common law negligence—had traditionally been recognized as actionable by state law, antedating the federal statutory scheme. However, in the instant case, Tectonics' action will pass on federal standards of "small business" which Congress has fully entrusted to the administrative judgment of the SBA. As noted in *Chicago and Northwestern Transportation Co.*, it was precisely the threat of differing state law interpretations and applications of federal standards which created a conflict with the federal scheme and necessitated a conclusion of federal preemption.

Finally, the *Silkwood* court noted that, if there were nothing more, the complexity of the nuclear safety standards and the inability of the states to formulate effective standards would disallow state law remedies, but "ample evidence that Congress had no intention of forbidding the states from providing such remedies" tipped the scales toward finding no federal preemption. 78 L.Ed.2d at 454. As noted above, such "ample evidence" of Congressional intent with regard to state law in its enactment of the Small Business Act does not exist.

In conclusion, the court of appeals' federal preemption analysis misconceives the meaning of *Silkwood* and contradicts the principles of more pertinent decisions of this Court. For this reason alone, this Court should grant review of this case. Sup.Ct. R. 17(1)(c).

**II. Interference with the Federal Procurement Process**

At a time when the quality and readiness of our nation's defense is under scrutiny and criticism, the issue of whether state causes of action such as Tectonics' will

conflict with or frustrate the federal procurement process is an important one. As discussed in the preceding section, Congress envisioned that timely, certain federal procurement would not be sacrificed for the purposes of the Small Business Act and, furthermore, granted the SBA the discretion to balance these competing interests. The SBA has done so through its regulations, and Tectonics' cause of action threatens to upset that balance.

If Tectonic's theory of the case is sustained, no prudent contractor would ever bid on more than one project until a final decision as to its size status had been reached. This chilling effect on federal procurement would not be in the nation's best interest. Federal procurement would come to a standstill if a decertification on a later project will sustain state common law claims with respect to prior projects. No prudent contractor would want to bid on a project for fear that, owing to a later decertification on a subsequent project, he could be liable for an incorrect certification on an earlier project. At the very least, the entire self-certification program, originally designed to speed procurement, would be rendered a nullity because only the reckless contractor would submit a bid without certification from the SBA itself. Furthermore, the court of appeals' decision intimates that even certification by the SBA itself might not be sufficient to bar the prosecution of a state cause of action based upon allegations that matters presented to the SBA were misrepresented.

In finding no federal cause of action arising out of the Small Business Act, the Ninth Circuit Court of Appeals has reasoned that the allowance of such a private cause of action would frustrate and conflict with the federal procurement process. *Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974). The Eleventh Circuit in the instant case specifically rejected this position of the Ninth Circuit and issued its judgment in direct conflict therewith. For this reason alone, this Court should grant review of the instant case.

Supt.Ct. R. 17(1)(a). In ruling that a private civil cause of action for loss of profits cannot be inferred from the provisions of the Small Business Act, the Ninth Circuit applied the following analysis:

> This Congressional purpose of aiding small business only insofar as the expeditious administration of government contracts is not jeopardized could be thwarted by permitting the private remedy requested here. In the present case, the federal contracting officer determined that the public interest would be better served by permitting Crooks Brothers to proceed with the emergency construction project. Had Crooks Brothers known that, depending on the post award outcome of the size appeal it would be subject to suit for its profits, it might well have declined to accept the award. Or, having accepted, it might have refused to continue work on the contract following the size appeals board determination that it was originally ineligible to bid. Finally, although Crooks Brothers might have continued to execute the contract, serious problems of quality and speed of work could have arisen given the possible deprivation of profits at the conclusion of the project.
>
> The likelihood that one such event would occur in the absence of a profit incentive is substantial. And the occurrence of any would undermine the Congressional intent to ensure competency in the execution of government contracts and to eliminate delay when time is a crucial factor.

540 F.2d at 1359.

A state cause of action, as asserted in the instant case, would have the same effect on federal procurement as the Ninth Circuit determined a federal cause of action would have. At least one commentator has reached the same conclusion that a private cause of action for damages such as Tectonics' would either bring federal procurement to a halt or "affect the quality and promptness of performance" of federal contracts. See 56 *Notre Dame Law.* at

572 (1981). For another court's conclusion that allowing such a private cause of action would "wreak havoc on procurement", see *Northland Equities, Inc. v. Gateway Center Corp.*, 441 F.Supp. 259, 263 (E.D. Penn. 1977).

In conclusion, allowance of Tectonic's cause of action conflicts with the legitimate Congressional objectives of uniform, efficient administration of the small business set aside program and speedy and certain federal procurement to ensure national security. In analogous administrative schemes, this Court has found federal preemption of such causes of action. Such a finding is even more compelling in this case where all the participants in the small business set aside program are potentially affected and where, in fact, every citizen of our nation stands to lose from this potential infringement on federal power to contract effectively for the well-being and security of our nation.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 83-7370

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs-Appellants,*

v.

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC., *et al.*,
*Defendants-Appellees.*

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Feb. 21, 1985

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Appeal from the United States District Court
for the Middle District of Alabama

Before GODBOLD, Chief Judge, JOHNSON and CLARK, Circuit Judges.

CLARK, Circuit Judge:

In February 1982, Tectonics, Inc. of Florida and Forest Builders, Inc. (Tectonics) filed a complaint in the Southern District of Florida against Castle Construction, the Collins Company and Agernon Blair, Inc. with regard to the bidding on a small business set-aside contract. Jurisdiction was based on diversity of citizenship. The defendants succeeded in an attempt to remove the case to

Alabama where the district court dismissed the case for failure to state a claim upon which relief could be granted. This appeal followed.

The question presented by Tectonics' appeal is whether a second low bidder can maintain separate state causes of action for damages against a low, successful bidder of a federal contract, when the latter company has misrepsented itself as a small business as defiend in 15 U.S.C.A. § 631(a) and regulations issued pursuant thereto by the Small Business Administration.

The United States Corps of Engineers issued an invitation for bids on a contract for construction at Red Stone Arsenal in Alabama. The invitation was limited to bids from small businesses as defined by the federal statute just mentioned. Tectonics, Inc. of Florida and Forest Builders, Inc. as joint venturers certified that they were small businesses within the statute and were the second lowest bidder for the construction contract. The defendant Collins Company, Inc. (Collins) gave a similar certificate to the Corps and was the successful bidder on the contract. Tectonics did not make a bid protest because it had relied upon Collins' misrepresentation that it was a small business. Later as a result of a protest filed by another company regarding a different construction contract, the Small Business Administration (SBA) decided that Collins was not a small business as defined by federal law. After becoming aware of this determination, Tectonics filed its complaint.

The complaint alleges that defendants Castle Construction Company, Inc. and Algernon Blair, Inc. provided 80% of Collins' original capitalization, indemnified the surety under the performance and bid bonds, provided employees to provide the bid estimates, and placed their corporate officers as directors of Collins. The complaint alleges that the defendants by so doing fraudulently misrepresented Collins as a small business company and

thereby prevented Tectonics from being the successful bidder of the contract. The complaint seeks recovery on theories of fraud and deceit, unjust enrichment, and interference with a business relationship, and seeks compensatory and punitive damages.[1]

The issues presented by this appeal are as follows: (1) Do the facts as alleged in the complaint state a cause of action under Alabama law? (2) In enacting the statute, did Congress provide a private cause of action for a second low bidder under facts as alleged by the appellants in their complaint? (3) If Alabama law provides a cause of action and Congress did not provide a private cause of action pursuant to the statute, does the federal law pre-

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[1] The claim of fraud alleges that if it had not been for the material misrepresentation made by Collins that it was a small business that the contract in question would have gone to the plaintiffs. Tectronics alleges that the misrepresentation was intentional and that the company has relied upon it to their detriment.

The claim of unjust enrichment alleges that the defendants in the action had received money and benefits in the form of profits from the contract. Tectonics claims that it would be inequitable to allow the defendants to retain the benefits of the misrepresentation by the Collins Company that it was a small business.

The claim of interference with a business relationship alleges that Tectonics had a business relationship with the Corps of Engineers by virtue of the company's past successful bidding and satisfactory performance of government construction contracts. The defendants by contrast were aware that Collins was not a small business and that the size of Collins and resources available to it from the other companies would give Collins an economic advantage over other businesses bidding for the project. Castle and Algernon Blair allegedly aided Collins by providing the surety for and preparing the bid, by providing corporate officers and financial capitalization and by agreeing not to give this information to other small businesses or to the government.

Tectonics claims that it could raise these causes of action under Florida or Alabama law. Since this case was removed to Alabama, on remand the district court must consider whether these causes of action will lie there.

empt the state law and deny a second low bidder an action for damages against the successful low bidder? (4) Did the former Fifth Circuit in its opinion in *Royal Services, Inc. v. Maintenance, Inc.*, 361 F.2d 86 (5th Cir. 1966), hold that federal law preempted such a cause of action in a state court and thereby become precedent for our decision in this case pursuant to this circuit having adopted Fifth Circuit case law prior to October 1, 1981 pursuant to *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981)?

The district court dismissed Tectonics' complaint holding "[t]hat Congress did not intend to give a civil remedy to the second lowest bidder against the lowest and successful bidder." (Dist.Ct.Op. p. 5). The district court believed that *Royal, supra*, was controlling. We agree with the district court that Congress did not intend to provide a civil private cause of action to the second lowest bidder under facts such as alleged here. However, we do not interpret the congressional legislation or the federal constitutional supremacy clause to preempt a state remedy under these facts, if a remedy is permitted, and we do not construe *Royal, supra*, as so holding. Finding that a party is not precluded from asserting such a cause of action if it is permitted pursuant to Alabama law, we reverse the district court.

## I. DOES *ROYAL* CONTROL?

In *Royal*, plaintiff alleged in a similar fashion that the defendant successful low bidder was not a qualified small business pursuant to the governing statute, and that defendant's ill-gotten contract with the United States Air Force permitted a diversity action under the laws of Florida whereby Royal could sue as a third-party beneficiary. The court in *Royal* defined the question presented as: "Did Congress . . . manifest an intent, in the event the certification [by the low bidder] was untrue and such bidder was awarded the contract, to give a cause of ac-

tion against such bidder to the next lowest bidder for loss of profits?" Further, the court said: ". . . we think no intent so to do may be implied therefrom [the statute]." *Royal, supra,* at 92. The court found under Florida law a third-party beneficiary could recover from one of the parties to a contract only if the contract disclosed an intention that the plaintiff have a cause of action. Finding no intent, the court held that the plaintiff had no cause of action. These two holdings were the basis of the *Royal* decision.

We adopt the following paragraph stated by the court in *Royal:*

> The declared purpose of the Small Business Act is to preserve and expand full and free competition for the economic well-being and security of the Nation, by encouraging and developing the actual and potential capacity of small business, through aiding, counseling, encouraging, assisting and protecting the interests of small businesses. We think the purpose was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security, and that there was no intent to create civil rights of action in private persons.

*Royal, supra,* at 92.

The fact that Congress did not create a private cause of action by manifesting an intent that the second lowest bidder would have a cause of action under facts such as alleged here,[2] does not mean that a cause of action may

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[2] The dissent construes *Royal Services* to hold that Congress intended to preempt a state cause of action when it enacted the SBA. The decision must be read in the context in which the panel was deciding the case. The plaintiff sought relief as a third party beneficiary of the contract between the United States and the defendant. The panel stated after quoting Florida law: "Thus, it will be seen that the test under Florida law is the intent of the parties to

not be maintained under state law. We shall discuss this aspect of the law in the next section of the opinion. First, however, we must complete the discussion of the *Royal* opinion.

The court in *Royal* points out that the plaintiff had alleged a theory of recovery based upon negligence but that this was not briefed and the court did not consider such a theory. Further, the court mentioned that Royal

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the contract that a third person shall be benefited by it." *Id.* at 91. The court court then made the analysis quoted by the dissent at pages 2 and 3. The panel's analysis and conclusion that Congress did not intend a private cause of action was to explain the approval of the district court's holding that the complaint failed to state a cause of action under Florida law. This conclusion stemmed from an initial finding that there was no intent on the part of the government to benefit a third party (next lowest bidder) when contracting with the lowest bidder. *Id.* at 92. Thus, the third party beneficiary claim under Florida law failed because the Small Business Act had not provided the necessary element of intent. However, *Royal* cannot be properly read as preempting state causes of action arising from violations of the Act. This view is bolstered by two cases referred to by the court in its discussion, *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); and *Blaney v. Florida National Bank of Orlando*, 357 F.2d 27 (5th Cir. 1966). *See Royal* at 92 n. 9. In *Case* the Supreme Court held that Congress in the Securities Exchange Act intended to create a private federal cause of action whereby holders of securities could sue a corporation which had breached the Act. In *Blaney*, the court writing through Chief Judge Tuttle held that the plaintiff did not have a private federal cause of action pursuant to regulations promulgated by the Board of Governors of the Federal Reserve System, pointing out that Congress had not intended such a cause of action when it enacted the Federal Reserve Act. The court was careful to point out that it was merely holding that in the absence of diversity our court lacked jurisdiction because there was not a federal cause of action, but that plaintiff could pursue a cause of action under state law. *Id.* at 28, 30. The majority agrees with the dissent that Congress did not intend to create a private cause of action, which was the holding of *Royal Services*. It is just as clear that neither Congress nor our court in *Royal Services* forbade a plaintiff seeking relief based on fraud to pursue that claim under state law.

did not include in its complaint but did assert in its brief that it had a claim pursuant to the federal false statement penal statute contained in 15 U.S.C.A. § 645(a). The court went on to point out that this criminal statute indicated no congressional intention to create a civil remedy in behalf of the United States or a private person and stated that what it had said with respect to the Small Business Act applied also to § 645(a). Thus, our construction of the opinion in *Royal* is that it goes no further than holding that Congress did not intend to create a private cause of action pursuant to the Small Business Act or pursuant to the federal false statement penal statute.

## II. DOES THE SMALL BUSINESS ACT OR THE UNITED STATES CONSTITUTION PREEMPT A STATE CAUSE OF ACTION?

We are required to go beyond the question answered in *Royal*, *supra*, which merely held that the Small Business Act did not create a private cause of action. The court in *Royal* thus presaged the holding in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *Cort* and its progeny have laid down guiding principles to assist in deciding when Congress intended the remedy of a private cause of action to derive from the violation of a federal statute. *Cort*, although denying a federal private cause of action to parties injured as a result of the violation of the federal statute involved therein, nevertheless held that it was entirely appropriate for the plaintiffs to seek any remedy created by state law.

Nevertheless, there areinstances where federal legislation can preempt any state cause of action. For example, in *Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984), the Supreme Court observed that "state law can be preempted in either of two general ways." *Id.* 104 S.Ct. at 621.

First, if it is Congress' intent to occupy a given field, then any state law within that field is preempted. *Id.; see also Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). Thus, Congress may preempt state authority to act by using explicit preemptive language in a statute. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Absent explicit preemptive language, Congress' intent to supersede state law altogether may be inferred because: (1) the scheme of the federal law is so pervasive that the reasonable inference is that Congress left no room for the states to supplement it; (2) the field in which the federal law touches is one where the federal interest is so dominant that it will be assumed to preclude the enforcement of state laws on the same subject; or (3) the object that is sought to be obtained by the federal law and the character of the obligations imposed by it reveal a strong federal purpose. *Pacific*, 103 S.Ct. at 1722; *Fidelity*, 102 S.Ct. at 3022.

Second, where "Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood*, 104 S.Ct. at 621 (citations omitted).

We now examine the Small Business Act, which has the purpose of perserving and expanding "full and free competition for the economic well-being and security of the Nation, by encouraging and developing the actual and potential capacity of small business, through aiding,

counseling, encouraging, assisting and protecting the interests of small business." *Royal*, 361 F.2d at 92.[3]

To effectuate the purposes of the Act, the Small Business Administration and the contracting procurement or disposal agency are required to give small businesses preferential treatment with respect to "set-aside" contracts. *See* 15 U.S.C.A. § 644. Bidders are also permitted to challenge the status of any other bidder by filing a written protest with the government contracting officer within the appropriate time limits. *See* 13 C.F.R. § 121.3-5 (1984).

As early as 1958, it was recognized that the programs of the SBA were "by no means a *complete answer* to the problems of small businesses . . . ." Pub.L. 85-536, 85th Cong.2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3071, 3074 (emphasis added). Similarly, an examination of the statutory scheme and legislative history of the Small Business Act leads us to conclude that Congress did not intend to occupy the entire field of small business concerns to the extent that all state remedies would be foreclosed for either the statute nor the applicable regulations expressly preclude state action in this field or dictate preemption. *Cf. Automated Medical Laboratory v. Hillsborough County*, 722 F.2d 1526, 1530

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[3] Section 631 of the Small Business Act provides in pertinent part:

> It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the over-all economy of the Nation.

15 U.S.C.A. § 631(a).

(11th Cir. 1984) ("Preemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons.").

This, however, does not end our analysis for as noted in *Silkwood* even if Congress has not *expressly* preempted the area, a remedy based on state law will be precluded if it conflicts with the Small Business Act or if it is an obstacle to the accomplishment of the purposes and objectives of the Act. In *Silkwood*, the Supreme Court indicated:

> We do not suggest that there could never be an instance in which the federal law would preempt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.

*Silkwood*, 104 S.Ct. at 626.[4]

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[4] *Silkwood* is particularly helpful in consideration of this case and the preemption position taken by the dissent. Mrs. Silkwood's estate was awarded $10,000,000 for punitive damages which verdict was reversed by the Court of Appeals for the Tenth Circuit, 667 F.2d 908 (10th Cir. 1981). The Supreme Court described the holding of the court of appeals as follows:

> In reaching its conclusion with respect to the punitive damages award, the Court of Appeals adopted a broad preemption analysis. It concluded that "any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material" was impermissible. 667 F.2d at 923. Because "[a] judicial award of exemplary damages under state law as punishment for bad practices or to deter future practices involving exposure to radiation is not less intrusive than direct legislative

Therefore, we now determine (1) whether the SBA prevents a state cause of action based upon the Act as a standard in determining whether the appellees have either committed fraud, been unjustly enriched or interfered with a business relationship and (2) whether the maintenance of such an action would result in an irreconcilable conflict between the federal and state standards or frustrate the objectives of federal law.

As indicated earlier, the policy of the Small Business Act is to encourage free competition and the development of small businesses, and to ensure that small businesses, and to ensure that small businesses receive a fair proportion of government contracts. *See* 15 U.S.C.A. § 631. Another "primary goal [is] to assure that government contracts [are] performed in a timely and competent manner." *Iconco v. Jenson Const. Co.*, 622 F.2d 1291, 1298 (8th Cir.1980).

Allowing this suit will neither result in an irreconcilable conflict between federal and state standards nor frustrate the aforementioned objectives. Rather, allowing the suit to proceed will be consistent with and promote the achievement of the goals and policies of the Act. As stated in *Iconco*:

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acts of the state," the court determined that such awards were preempted by federal law. *Id.*

104 S.Ct. at 620. The United States as amicus curiae contended that the award of punitive damages was preempted because it conflicted with the federal remedial scheme, contending that the NRC is authorized to impose penalties on licensees when the federal standards have been violated. In response to this contention, the Supreme Court said:

> However, the award of punitive damages in the present case does not conflict with that scheme. Paying both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme.

104 S.Ct. at 626.

> If a contract set aside for small businesses has been performed by a concern that is not small, the intent of Congress has not been advanced. Allowing an unsuccessful bidder to recover on unjust enrichment and fraud theories, when the proof justifies such recoveries, is *consistent with the salutary purpose of the Act.*

*Id.* at 1298 (emphasis added).

The appellees argue that to allow a state cause of action for a violation of a federal law would disrupt the bidding process. This has been noted by one of the courts when it determined that a private cause of action for lost profits or similar actions cannot be inferred from the provisions of the Small Business Act. *See Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355, 1358-59 (9th Cir.1974). The *Savini* court stated:

> Had [the bidder] known that, . . . it would be subject to a suit for profits, it might well have declined to accept the award. Or, having accepted, it might have refused to continue to work on the contract following the Size Appeals Board determination that it was originally ineligible to bid. The likelihood that one such event would occur is substantial. And the occurrence of any would undermine the Congressional intent to insure competency in the execution of government contracts. . . .

*Id.* at 1358-59. We disagree with the *Savini* court's dictum. As in *Iconco v. Jenson Const. Co., supra*, we find that "[t]he mere threat of legal action, without more, is not sufficient . . . to discourage either the submission of bids or the acceptance of a contract award." *Id.* at 1299. "The *only* effect of a judgment for the plaintiff is to deprive [the] defendant of a benefit which . . . Congress never intended it to have." *Id.* (emphasis added).

By allowing a state cause of action, if it is permitted under state law, we do not imply that relief would be

permissible under all circumstances. For example, if the plaintiff were seeking an injunction to stop the performance of a government contract we might well have a different view. That issue is not before us. The critical question is whether the maintenance of the cause of action will be disruptive to the full performance of an established government contract. If it will seriously disrupt the performance of the contract, the action should not be maintained. Here the appellees have not established that the cause of action will affect the performance of this contract. Speculation that the maintenance of the action will either alter the contractual obligations between the appellees and the government or prevent the contract from being fully completed is not sufficient to deny the sufficiency of plaintiffs' complaint.[5]

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[5] The dissent at pages 7 and 8 raises the question as to whether there is a conflict between the federal scheme and plaintiffs' cause of action. Perhaps the dissent overlooks that we have the case on the grant by the district court of defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted. We reiterate that if the defendant can establish that the cause of action conflicts with the interest of the government, it has the right to plead that and the district court can consider it at the appropriate time. We specifically reject the holding in *Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974), relied upon by the dissent. The dissent urges that *Savini* was correct in holding that a damages remedy conflicted with the Small Business Act when it said:

> Had Crooks Brothers [the low bidder] known that, depending on the post-award outcome of the size appeal, it would be subject to suit for its profits, it might well have declined to accept the award.

*Id.* at 1359. If the low bidder knows that it is not an eligible small business concern entitled to a government contract, it well knows that it is subject to a suit for damages growing out of fraud, as is brought here. If it does not know that, it is the holding of the majority that it should know. We see no justiciable or conscionable reason for permitting a large business to establish a bogus corporation which it controls, have it meet the definition of a small business company, and secure a government contract to which the

Thus, we hold that Congress, by enacting the Small Business Act, did not preempt the field so as to preclude a state cause of action based upon the Act as a standard in determining whether the actions of fraud, unjust enrichment or interference with a business relationship are available to a second low bidder against a low successful bidder of a federal contract when the latter has misrepresented itself as a small business.

## III. WHETHER A STATE CAUSE OF ACTION IS AVAILABLE UNDER ALABAMA LAW

A state court is " 'free to look to the provisions of a federal statute for guidance in applying its longstanding common-law remedies' unless Congress has prohibited the state from looking to the statute's provisions as a standard in determining whether there has been a common-law breach of duty." *Hofbauer v. Northwestern National Bank of Rochester, Minnesota*, 700 F.2d 1197, 1201 (8th Cir.1983) (citing *Iconco, supra*); *see also Iconco, supra.* As we have pointed out, the Small Business Act does not itself create a federal cause of action. However, it does not *prevent* a state court from finding fraud, unjust enrichment or interference with a business relationship where there has been a violation of the statute.

As this issue was not addressed by the district court, we do not address it on appeal. On remand, the district court must determine whether the Supreme Court of Ala-

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large company would not be entitled if it followed the law. We see no difference in a bidder who has been deprived of a contract through the fraud of a non-eligible company having a cause of action than Mrs. Silkwood's estate having a cause of action to recover for punitive damages as was approved by the Supreme Court in *Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). We do not suggest in the slightest that the defendant company in this case was guilty of any wrongdoing whatsoever. We merely say that if the plaintiffs' allegations are true, plaintiffs have a cause of action which is not preempted by the Small Business Act.

bama would use the Small Business Act as a standard in determining fraud, unjust enrichment or interference with a business relationship.

REVERSED and REMANDED.

GODBOLD, Chief Judge, dissenting:

This is a subtle case because of the interplay of *Royal Services, Inc v. Maintenance, Inc.*, 361 F.2d 86 (5th Cir. 1966), which is binding upon us, traditional principles of preemption, and policies of federalism and comity. Added to this are matters of effective judicial administration involving certification of an issue to a state supreme court.

I. *Royal Services, Inc.*

It is unquestioned that there is no private federal cause of action for violation of the Small Business Act and the regulations thereunder. Also it cannot be questioned that heretofore Alabama has not by statute or decision incorporated into its body of tort law a right in one bidder to sue another bidder for violation of provisions of the Small Business Act. Nevertheless, plaintiff contends that the standards of conduct created by the Act, if broken, give rise to a tort action under Alabama law. *Royal Services* seems to me to hold the contrary.

The plaintiff in *Royal Services* was a second low bidder, like plaintiff here, suing the successful bidder on the ground that the successful bidder had misrepresented to the government its status as a small business concern. Plaintiff asserted two grounds: first, that, based on Florida law, plaintiff was the third-party beneficiary of the contract between the low bidder and the government (in which contract defendant had made the alleged misrepresentation), and, second, defendant had negligently miscertified itself. On appeal plaintiff did not argue the negligence theory, and the court did not consider it.

With respect to the claim based on alleged third-party beneficiary status, the Fifth Circuit looked to Florida law to find its test for determining when there is a third-party beneficiary relationship, and found that Florida used an "intent" test. 361 F.2d at 91. The court assumed without deciding that this was the proper test to be applied. *Id.* To find the answer to the intent issue the court looked to the contract and the Small Business Act and the regulations thereunder. The court held that the construction of the Act and the regulations was a matter of *federal*, not state, law. The *federal* court examined these *federal* sources and, as a matter of *federal* law, concluded that they evidenced no intent to create a cause of action. No federal cause of action was involved in the case or under discussion; the only cause of action alleged and the only cause of action discussed was the state law cause of action for breach of contract as asserted by a third-party beneficiary. Thus, the court's decision was that no state-law civil cause of action was intended to be created. The court said:

> Did Congress by the pertinent provisions of the Small Business Act and the rules and regulations promulgated thereunder and the requirement that a bidder prior to the opening of the bids make a good faith certification respecting his status as a small-business concern manifest an intent, in the event the certification was untrue and such bidder was awarded the contract, to give a cause of action against such bidder to the next lowest bidder for loss of profits?
>
> We shall turn now to Royal's first contention. Clearly, there is no express provision in the Small Business Act or the rules and regulations promulgated thereunder giving a civil remedy to the second lowest bidder for loss of profits or for damages suffered because of an untrue statement made by the successful bidder in his certification respecting his

> status as a small-business concern, and we think no intent so to do may be implied therefrom.
>
> The declared purpose of the Small Business Act is to preserve and expand full and free competition for the economic well-being and security of the Nation, by encouraging and developing the actual and potential capacity of small business, through aiding, counseling, encouraging, assisting and protecting the interests of small businesses. We think the purpose was public in character, viz., the preservation and expansion of full and free competition to insure the Nation's economic well-being and security, and that there was no intent to create civil rights of action in private persons.

*Id.* at 92.

While the *Royal Services* court did not employ the word "preemption" as a word of art, its conclusions answer authoritatively the traditional steps in a preemption analysis, discussed in Part II below. The only difference between *Royal Services* and this case is that one second low bidder sued on a contract theory under Florida law and the other second low bidder sued on a tort theory under Alabama law. The majority correctly says that in *Royal Services* the court was answering the question whether in enacting the Small Business Act Congress intended to confer such a benefit on a second low bidder that it could, as third party beneficiary of the contract between the government and the low bidder, sue the low bidder. The court answered that question "No." What is important is the reason the court gave for answering in the negative. As set out above in the quoted material from the decision, after discussing the general purposes of the Act the court gave its reason (which does not even appear in the majority opinion in this case). It was:

> We think had Congress intended to give a civil remedy to the second lowest bidder against the low-

> est and successful bidder, because the latter made an untrue statement in his certification respecting his status as a small-business concern, it would have done so, either by express provision or by clear implication. It did not do so in the Small Business Act.

361 F.2d at 92. In short, the intent element required by Florida law for a third-party beneficiary suit was not present because Congress did not intend to give a civil remedy to the second low bidder. The majority does not explain why it makes a difference that the state court civil remedy under examination was a suit on contract while in the present case the civil remedy under examination is a suit in tort.

## II. Preemption

Under traditional preemption analysis, the federal law concerning right to sue for violation of the Act or the regulations preempts state law, and there can be no state cause of action. This court recently set out the steps in a preemption analysis. *Automated Medical Laboratories, Inc. v. Hillsborough County*, 722 F.2d 1526 (11th Cir. 1984). Initially the court must ascertain whether there is "any explicit declaration of congressional design to displace state regulation." *Id.* at 1530. The parties do not suggest any such declaration in the Small Business Act or in the legislative history.

Finding no explicit intent, "we must next examine Congress's implicit intent in enacting the federal scheme." *Id.* There are three tests for determining whether Congress has implicitly preempted state law, only one of which need be satisfied for preemption to exist:

First, is the federal scheme "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Id.* at 1531. Federal regulation of federal government contracts and procurement is pervasive and comprehensive. Among the areas regu-

lated by statute and agency rules are who can submit bids, when they are to be submitted, whether there are to be set-asides for small businesses and minority contractors, how bids are to be evaluated, the discretion the government agency has to select among competing bids, the procedures for challenging competing bidders, and the standards for determining eligibility of bidders. As an example, 13 C.F.R. contains 41 pages of regulations on the topic "Small Business Size Standards." These regulations determine eligibility of small businesses to bid on business contracts such as the one at issue. They provide for the initial determination of eligibility, a competitor's method of protest, procedure for investigating informally evaluating compliance with eligibility compliance, appeals procedures, and sanctions for bidding when not eligible. 13 C.F.R. § 121 *et seq.* (1983). With this wide scope and specificity, it is reasonable to conclude that Congress has occupied the field and has left no room for state regulation of the federal procurement process.

Second, is the area "a field in which the federal interest is so dominant that the federal system must be assumed to preclude" state enforcement? The government interests in this area are uniquely federal. One such interest is the need to have work performed for the government on a timely basis, at the least expensive cost possible, by competent contractors. All federal procurement regulations are targeted at achieving this goal. The goal is sometimes tempered by other federal concerns such as assisting small business in gaining a share of the market and thereby promoting competition and aiding minority businesses in attaining a fair share of government contracts. But even these are federal interests, attainable under Congress's commerce clause powers or its civil rights authority.

When Congress has these mixed goals of procurement and assistance to selected businesses, the balance to be struck between these goals is a *federal* question. The

*Federal* government has a strong interest in seeing that the groups prescribed for set-asides are aided, while at the same time the government's interest that its contracts be awarded and performed in an efficient manner is not injured. In choosing between certainty on eligibility for small business set-asides and speed in having contracts performed, Congress has explicitly struck that balance by specifying that a bidder's certification will be binding on a specific contract unless a protest by a competitor is filed on a timely basis and contains adequate factual allegations concerning the bidder's ineligibility. Congress has decided that it would rather have a business later found to be ineligible perform small business set-aside work than to delay performance by permitting late challenges. In light of these factors, it is reasonable to conclude that Congress has preempted the field on procureemnt contracts and eligibility for small business set-asides.

Third, is there a conflict between the federal scheme and the challenged state regulation? Some of the courts that have considered whether there is a private right of action under federal law against a competing bidder have addressed the issue of whether an action for damages would conflict with the federal scheme. They have concluded that it would. *E.g. Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974); *Mid-West Construction Co., Ltd. v. U.S.*, 181 Ct.Cl. 774, 387 F.2d 957 (1968); *Northland Equities, Inc. v. Gateway Center Corp.*, 441 F.Supp. 259 (E.D.Pa. 1977). These conclusions apply here, because there is no difference between a federal damages remedy and a state damages remedy if the ultimate question is whether such a remedy conflicts with the goals of the federal scheme.

*Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389 (5th Cir. 1970) is factually similar to the present case, but different in analysis. The result is, however, the same. Plaintiff contended that Oklahoma state law, under which negligence of a bailee of an airplane would not be

imputed to the bailor, had been widened by a provision of the Federal Aviation Act that arguably imposed bailor liability. The Fifth Circuit analyzed the issue in terms of whether Congress intended to preempt the state law of bailments to the extent of expanding its scope. The court stated its disbelief that Congress would undertake to alter the tort laws of numerous states in so oblique a fashion and found no intent to supersede state laws of bailments as related to operation of airplanes. The court remanded the case for entry of summary judgment for defendant. Whether one examines preemption in an affirmative manner, asking whether the federal scheme occupies the field and therefore excludes state regulation, as I have done, or in a negative manner, as in *Rogers*, asking whether there is an absence of congressional intent to expand by federal statute an unoccupied area of state law, the result is the same in this case. We know from *Royal Services* that Congress did not intend a state right to recover based upon violation of the Act.

In *Savini Construction Co.*, the court pointed to one of the conflicts created by a damages remedy.

> Had Crooks Brothers [the low bidder] known that, depending on the post-award outcome of the size appeal, it would be subject to suit for its profits, it might well have declined to accept the award. Or, having accepted, it might have refused to continue work on the contract following the Size Appeals Board determination that it was originally ineligible to bid. Finally, although Crooks Brothers might have continue to execute the contract, serious problems of quality and speed of work could have arisen given the possible deprivation of profits at the conclusion of the project.

540 F.2d at 1359. In this case the possible harm to the low bidder is even more speculative and difficult to ascertain in advance of bidding, because unlike *Savini*, the plaintiff here did not even file a size protest on a timely

basis. The low bidder here had no notice of its possible liability to Tectonics until suit was filed. To permit the interjection of Alabama's tort law to create this additional burden on federal bidders erects a hurdle to the accomplishment of the federal scheme.

*Northland Equities, Inc. v. Gateway Center Corp.*, 441 F.Supp. 259 (E.D.Pa. 1977), concerned an attempt by an unsuccessful bidder under federal procurement procedures to assert a federal cause of action on the ground that the successful bidder had failed to comply with bid specifications. The court, in granting summary judgment for defendant, considered *Savini Construction* and the analogy of rejection of claims of unsuccessful bidders under the Small Business Act.

> The rejection of SBA claims, despite a clear congressional expression of concern for the welfare of small businesses, strongly suggests the impropriety of creating a private action for damages under the procurement laws. By deterring unsuccessful bidders from acting at an early date to overturn an award, such a policy would similarly frustrate existing enforcement mechanisms under the procurement statutes. Presently, an unsuccessful offerer has several available methods by which he can challenge an award which he believes was improperly made. He can file a protest with the contracting officer who is required to consider all protests submitted before or after an award is made (41 C.F.R. §§ 1-2.-407-8); he can file a protest with the General Accounting Office (GAO), where the Comptroller General must investigate the award and issue a report affirming or voiding the award (4 C.F.R. §§ 20.0-.10); and finally, he can seek judicial review of the award and injunctive relief in federal court.

441 F.Supp. at 259. Like administrative procedures are available to plaintiff in the present case. The *Northland* court went on to hold:

> Now, years after the 1971 award to Gateway, plaintiff seeks lost profits, bid costs and punitive damages. While this court by no means wishes to condone possible fraud, neither does it want to encourage possible speculative plaintiffs to wait until a building is constructed and inhabited before attacking the propriety of the initial award. This would wreak havoc on procurement. In order to be compatible with statutory goals, a remedial scheme must guarantee that the bidder will act at a time when the proper bidder can still be selected. By telling the unsuccessful bidder that he may wait until after his competitor has performed and then sue to recover possible lost profits, the courts would provide an irresistible disincentive to his coming forth at an earlier time. Any award goes into the private pocket of the unsuccessful bidder, not into the public treasury, even though the government suffers by not having procured the most advantageous bid.
>
> It is judicious to consider not only the ill effect on procurement, but also the strain on the effectiveness of the already burgeoning federal court system, before ascribing to Congress the intention to open up a new right of private action. Having thoroughly considered this issue, this court finds that a private cause of action for damages and lost profits under the procurement statutes cannot be implied.

441 F.Supp. at 263-64.

All three of the tests for preemption laid out in *Automated Medical* are satisfied in this case, though only one need be satisfied, which means that federal law preempts. 722 F.2d at 1533.

The majority follows the opinion of the Eighth Circuit in *Iconco v. Jensen Const. Co.*, 622 F.2d 1291, 1298 (8th Cir. 1980). That case affirmed a judgment in favor of the second low bidder against the low bidder, on state law

grounds of fraud and unjust enrichment, based upon miscertification by the low bidder of its small business status. The Eighth Circuit held that Iowa was free to look to the Small Business Act for standards to apply in fashioning its common law. It examined the Small Business Act and found nothing in the statutory and regulatory schemes to support an implied prohibition against a state doing this. This is precisely the opposite of the finding of Congressional intent that the Fifth Circuit had reached in *Royal Services*. The Eighth Circuit did not overlook *Royal Services*. Rather it addressed *Royal Services* and specifically considered and rejected the holding of the Fifth Circuit that implying a private action by an unsuccessful bidder against a successful one was inconsistent with Congressional intent:

> To the extent, however, that the language used in those cases [*Royal Services* and *Savini Construction*] supports the conclusion that any private suit by an unsuccessful bidder against a successful one is inconsistent with Congressional intent and would jeopardize the proper administration of the government's contract procurement system, we respectfully disagree for the reasons we have stated.

622 F.2d at 1299. Having rejected the *Royal Services* finding of Congressional intent, the court adopted an opposing construction of Congressional intent. *Id.* Moreover, the Eighth Circuit misread *Royal Services* as involving only the issue of whether a federal cause of action could be inferred from the Act. *Id.* As we have pointed out above, the case concerned the existence of a Florida cause of action. This court is bound by *Royal Services*. It is not free to reject it and to climb aboard a decision by another circuit that has reached an opposing conclusion and rejected *Royal Services*' basis for decision as well.

## III. The state law "window"

What the majority seems to say is that Alabama is free to incorporate into its tort law a cause of action for

breaches of duties set out in the Small Business Act, and the decision remands the case to the district court for it to decide whether Alabama has or will make such a choice. In an abstract sense Alabama can, of course, incorporate into its tort law whatever breaches of duty it perceives accord with its state policies, so long as not barred by the Supremacy Clause. But in this instance *Royal Services* has decided that the *federal* policy is that the federal statute, statutory scheme and regulations did not intend to create a private cause of action. If there is a non-preempted "window" left for a state-law cause of action, created as a matter of state policy, it is a narrow one at best. Under our system of federalism, where comity is important and federal-state systems have a decent regard for each other and for each other's views and policies, it seems to me doubtful that a state would create a new area of tort liability by incorporating into its common law of torts provisions of a federal statute when the federal court of the circuit in which the state is located has held that in enacting the statute Congress did not intend a private state cause of action. This would bring state policy into collision with federal policy. The possibility reinforces that this court's decision on preemption is incorrect.

## IV. Certification, Comity and Federalism

If this court follows neither *Royal Services* nor traditional preemption analysis, then it is a paradigm for certification by this court to the Alabama Supreme Court. If that court responds that there is no state cause of action, the matter will be at an end.[1] Rather than take

[1] If this court chose to certify, it would not need to address the preemption issue until we learn from the authoritative source, the state supreme court, whether a cause of action exists. If none exists we will not have cluttered up the law books and fly-specked the law by a discussion, which will have become hypothetical at best, concerning whether federal law preempts a non-existent state cause of action. If the Alabama court responds that there is a

this direct and straightforward approach the court remands to the district court for it to decide whether there is an Alabama cause of action. This is an anomalous assignment for a federal court when decision of this new state-law issue necessarily implicates the extent to which the state, as a matter of comity, wishes to give effect to expressed federal interests. Under Alabama certification procedures the federal district court can certify the cause of action question to the Alabama Supreme Court, and I hope that it will consider doing so. Should the district court decide the issue for itself without certifying to the Alabama Supreme Court, regardless of how it decides, we can predict what will happen. The case will come back to this court on a second appeal, and this court will then have to revisit the question of whether we should certify the question to the Alabama Supreme Court. Surely this additional circumlocution is unnecessary.

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state cause of action, we could then address the preemption question bearing in mind the contours and scope of the cause of action that the state court has defined.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 83-7370

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TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs-Appellants,*

versus

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC., ETC., *et al.*,
*Defendants-Appellees.*

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[Filed June 20, 1985]

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Appeal from the United States District Court for the
Middle District of Alabama

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ORDER

( ) The motion of _____
for ☐ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____
for ☐ stay ☐ recall and stay of the issuance of

the mandate pending petition for writ of certiorari is GRANTED to and including ————————, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(XX) The motion of appellees Castle Construction Company, et al. for a further stay of the issuance of the mandate is GRANTED to and including August 5, 1985, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of appellees Castle Construction Co. for a further stay of the issuance of the mandate is DENIED.

/s/ Thomas A. Clark
United States Circuit Judge

## APPENDIX C

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

---

Civil Action No. 82-760-N

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs,*

v.

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC. OF DELAWARE, and ALGERNON BLAIR, INC.,
*Defendants.*

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[Filed June 16, 1983]

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### OPINION

This cause of action, based on diversity jurisdiction, 28 U.S.C.A. § 1332, has been brought by a second low bidder against a low bidder and others, charging the low bidder and others with fraud and deceit, unjust enrichment, and interference with a business relationship in securing a federal government contract for the low bidder. This cause is now before the court on a motion to dismiss for failure to state a claim upon which relief may be granted, which motion for reasons which follow is due to be granted.

I.

Since this cause is before the court on a motion to dismiss for failure to state a claim, the allegations of the complaint must be accorded a liberal construction and taken as true. *Royal Services, Inc. v. Maintenance, Inc.*, 361 F.2d 86, 90 (5th Cir. 1966). These allegations are as follows:

(1) The United States Corps of Engineers issued an invitation for bids on a contract for construction at Red Stone Arsenal in Alabama. The invitation was limited to bids from small businesses as defined in 15 U.S.C.A. § 631 (a) and the regulations promulgated by the Adminsirtator of the Small Business Administration.

(2) Acting in a joint venture under the name of Fortex Constructors, the plaintiffs Tectonics, Inc. of Florida and Forest Builders, Inc. certified to the Corps that they were a small business and submitted a bid for the construction contract.

(3) The defendant Collins Company, Inc. also certified to the Corps that it was a small business and submitted a bid for the construction contract. The defendants Castle Construction Company, Inc. and Algernon Blair, Inc. assisted Collins in preparing its bid. Collins' bid was the low bid and Colilns received the contract and completed the construction contract.

(4) Later, as a result of a protest filed by another corporation regarding another federal construction contract, the Small Business Administartion determined that Collins was not a small business as defined by federal law.

(5) The complaint further alleges a conspiracy between Collins, Castle and Algernon, as follows:

> Defendants, ALGERNON and CASTLE did, with knowledge of their ineligibility to bid, conspire with the Defendant, COLLINS, in the following ways with the desired result of having the Plaintiffs lose their

business opportunities with the Corp of Engineers of the United States Government:

A. Defendant, ALGERNON, provided eighty percent (80%) of Defendant, COLLINS, original capitalization.

B. Defendant, ALGERNON, indemnified the surety under performance and bid bonds issued on behalf of COLLINS concerning the invitation to bid.

C. Defendants, ALGERNON and CASTLE, allowed COLLINS to utilize their employees for the purpose of the bid preparation estimates and for business operations of Defendant, COLLINS, concerning the invitation to bid.

D. Defendants, ALGERNON and CASTLE, placed their corporate officers as directors of COLLINS.

E. Defendants, ALGERNON and CASTLE, rendered such other financial and technical assistance as was essential to Defendant, COLLINS, to be qualified to respond to the invitation to bid and to perform the requirements of the contract.

F. Defendants, ALGERNON and CASTLE, arranged for Defendant, ALGERNON, to receive a non-interest bearing demand note from COLLINS, which was not capable of being paid upon demand.

G. Defendants, ALGERNON and CASTLE, arranged for the Defendant, COLLINS, to have its stock certificates endorsed in blank and held by the Defendant, ALGERNON.

H. Defendants, ALGERNON, CASTLE and COLLINS agreed not to reveal the information contained in Paragraphs A through G above to any small business concerns, including the Plaintiffs.

I. Defendants, ALGERNON, CASTLE and COLLINS, agreed not to reveal the information contained

in Paragraphs A through G above to the Corps of Engineers of the United States Government when preparing the bid in reply to the invitation to bid and, in fact, agreed among themselves that COLLINS would represent and certify to the Corps of Engineers of the United States Government that COLLINS was, in fact, a small business concern when, in fact, Defendants knew that COLLINS was not a small business concern.

Based on theories of fraud and deceit, unjust enrichment, and interference with a business relationship, the plaintiffs now seek compensatory and punitive damages from the defendants.

II.

In *Royal Services, Inc. v. Maintenance, Inc.*, 361 F.2d 86 (5th Cir. 1966), the former Fifth Circuit was confronted with the following allegations on a motion to dismiss. Royal Services, Inc. and Maintenance, Inc. each submitted bids for the award of a custodial contract for a military base; and since the contract was limited to small businesses, each certified that it was a small business. Maintenance received the contract; and, in response, Royal filed a protest with the Small Business Administration, claiming that Maintenance was not a small business, and instituted a lawsuit in a Florida district court against Maintenance to recover profits it claimed it would have recovered had the contract been awarded to it. In its lawsuit Royal invoked the diversity jurisdiction of the trial court and advanced the state law theory that Maintenance by its misrepresentation breached its "self certification contract" with the government and taht Royal was a third-party beneficiary of the contract. *Id.*, at 87-88.

The Fifth Circuit, after acknowledging that Florida law recognized such a cause of action, observed that whether the provisions of Small Business Act supported such a cause of action involved in a construction of those

federal provisions, which construction was, of course, a matter of federal, not state, law. *Id.*, at 91. Construing the provisions, the appellate court concluded that Congress did not intend to afford a civil remedy to an unsuccessful bidder against a successful one. The court stated that,

> We think had Congress intended to give a civil remedy to the second lowest bidder against the lowest and successful bidder, because the latter made an untrue statement in his certification respecting his status as a small-business concern, it would have done so, either by express provision or by clear implication. It did not do so in the Small Business Act.

*Id.* at 92 (footnote omitted).

The plaintiffs in the present case contend that *Royal* is distinguishable. They maintain that the court in *Royal* held that there was no *federal* private right of action under the Small Business Act and did not address the issue whether the Act might support a cause of action based on *state* law. They point to the Eighth Circuit case of *Iconco v. Jensen Construction Company*, 632 F.2d 1291 (8th Cir. 1980), which held that an unsuccessful bidder had a cognizable claim against a successful bidder on the theory that the successful bidder's failure to qualify as a small business, as required by the government contract, constituted fraud and unjust enrichment under Iowa law.

First of all, *Royal*, if read properly, is not as narrow as the plaintiffs contend. In *Royal* the diversity jurisdiction of the court had been invoked and the plaintiff was traveling on a theory of state law.[1] *Royal* held that the

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[1] Compare *Royal to Savini Construction Co. v. Crooks Brothers Construction Co.*, 540 F.2d 1355 (9th Cir. 1974). In *Savini* the court, whose subject matter jurisdiction had been invoked pursuant to 28 U.S.C.A. § 1331, held that no *federal* private cause of action could be inferred from the Small Business Act.

provisions of the Small Business Act did not support a breach of contract theory under Florida law. In the present case, the diversity jurisdiction of the court has also been invoked and the plaintiffs are traveling on theories of fraud and deceit, unjust enrichment, and interference with a business relationship. While the state theories presented in *Royal* and the instant case differ, this court is of the opinion that *Royal*'s interpretation of the Small Business Act controls the instant case: That Congress did not intend to give a civil remedy to the second lowest bidder against the lowest and successful bidder.

Furthermore, the plaintiffs' reliance on *Iconco* is of no help to them. This court is bound by *Royal*, not *Iconco*. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (en banc).[2]

An appropriate judgment will be entered in accordance with this opinion.

DONE, this the 16th day of June, 1983.

/s/ [Illegible]
United States District Judge

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[2] The plaintiffs' reliance on *Hayes International Corporation v. McLucas*, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 123 (1975), is also misplaced. The concerns before the court in *Hayes* involved issues of standing, and the court's observations and conclusions do not conflict with those in *Royal*.

## APPENDIX D

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

---

Civil Action No. 82-760-N

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs,*

v.

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC. OF DELAWARE, and ALGERNON BLAIR, INC.,
*Defendants.*

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[Filed June 16, 1983]

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JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court that the defendants' motion to dismiss be and it is hereby granted, and that this cause be and it is hereby dismissed.

I is further ORDERED that costs be and they are hereby taxed against the plaintiffs.

DONE, this the 16th day of June, 1983.

/s/ [Illegible]
United States District Judge

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 83-7370

D.C. Docket No. 82-760

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs-Appellants,*

versus

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC., *et al.*,
*Defendants-Appellees.*

---

Appeal from the United States District Court for the Middle District of Alabama

---

Before GODBOLD, Chief Judge, JOHNSON and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same

is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

GODBOLD, Chief Judge, dissented and filed an opinion.

Entered: February 21, 1985

For the Court: Spencer D. Mercer
Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate:

**APPENDIX F**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 83-7370

---

TECTONICS, INC. OF FLORIDA and FOREST BUILDERS, INC.,
*Plaintiffs-Appellants,*

versus

CASTLE CONSTRUCTION COMPANY, INC., a/k/a ALABAMA CASTLE CONSTRUCTION COMPANY, INC., COLLINS COMPANY, INC., *et al.*,
*Defendants-Appellees.*

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[Filed May 7, 1985]

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Appeal from the United States District Court for the
Middle District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion February 21, 11 Cir., 1985, —— F.2d. ——).

(May 7, 1985)

Before GODBOLD, Chief Judge, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the court having polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

## APPENDIX G

## UNITED STATES CONSTITUTION

### ARTICLE VI.—DEBTS VALIDATED. SUPREME LAW OF LAND

All Debts and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## APPENDIX H

### EXCERPTS FROM UNITED STATES CODE

#### 5 U.S.C. § 706(2)(A)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * *

#### 15 U.S.C. § 633(a)

§ 633. Small Business Administration

(a) Creation; principal, branch, and regional offices

In order to carry out the policies of this chapter there is an agency under the name "Small Business Administration" (herein referred to as the Administration), which Administration shall be under the general direction and supervision of the President and shall not be affiliated with or be within any other agency or department of the Federal Government. The principal office of the Administration shall be located in the District of Columbia. The Administration may establish such branch and regional offices in other places in the United States as may be determined by the Administrator of the Administration. As used in this chapter, the term "United States" includes the several States, the Territories and possessions of the United States, the Com-

monwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.

15 U.S.C. § 634(b)(6)

* * * *

(b) Powers of Administrator

In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—

* * * *

(6) make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter.

* * * *

15 U.S.C. § 644(a)

§ 644. Awards or contracts

(a) Determination

To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobolizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with re-

spect to the sale of electrical power or other property by the Government or any agency thereof. These determinations may be made for individual awards or contracts or for classes of awards or contracts. Whenever the Administration and the contracting procurement agency fail to agree, the matter shall be submitted for determination to the Secretary or the head of the appropriate department or agency by the Administrator.

## APPENDIX I

## EXCERPTS FROM CODE OF FEDERAL REGULATIONS

### 13 C.F.R. §§ 121.8-121.11

§ 121.8 Size determinations.

(a) Original size determinations shall be made by the regional director, or his delegatee, serving the region in which the principal office of the concern (not including its affiliates) whose size is in question is located, except that for lease guarantee reinsurance purposes such determinations shall be made by the Associate Administrator for Finance and Investment. The regional director or his delegatee, or the Associate Administrator for Finance and Investment promptly shall notify in writing, by certified mail, return receipt requested, the concern in question and other interested persons of his decision. Such determination shall become effective immediately and shall remain in full force and effect unless and until reversed by the Small Business Administration. For the purpose of Government procurements or sales, a size determination shall be made only in the event of a protest pursuant to these regulations, a request for recertification, a request for a Certificate of Competency, or if the Associate Administrator for Procurement Assistance or his delegatee or a regional director or his delegatee determines it necessary to question the size status of a concern for the purpose of any Small Business contracting program or Procurement Source Program, or for property sales purposes or for any other purpose relating to Government procurement or sales. For the purpose of SBA financial assistance, a formal size determination under this provision shall be made by the Regional Office only (1) where the regular review of the loan file or other substantial evidence indicates the need therefore and a request is made by the appropriate SBA financial assistance official, or (2) where an initial determination is made by the SBA

financial assistance officer that the concern is other than small and a request is made by the loan applicant. Initial nonformal financial assistance size determinations may not be appealed.

(b) Once properly instituted (i.e., by filing of a protest or by an official request for determination) formal size determinations may be completed, even if the particular application, bid, or offer is subsequently withdrawn, or the Government procurement or sale is cancelled or awarded.

(c) The size determination will be based primarily on facts and allegations supplied by the parties to the SBA. If deemed necessary or appropriate SBA may utilize other information in its files and may make inquiries including requests to the parties or other persons for additional specific information. The burden of establishing its small business size by submitting full information to SBA shall be upon the concern whose size status is under consideration. Specific signed factual evidence will be weighed more heavily by SBA than general unsupported allegations or opinions. In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure. The SBA formal size determination shall be based upon the record, including reasonable inferences therefrom, and shall state in writing the basis for its findings and conclusions.

(d) If SBA has made a formal size determination that a particular concern is not small, the concern will not be deemed eligible within such applicable size standard for any assistance under the Small Business Act or the Small Business Investment Act of 1958, unless it is thereafter recertified by SBA as a small business. After such an adverse size determination, the concern shall not self-certify itself as small within the same or a lower em-

ployee or annual receipts size standard (whichever is applicable) unless it is recertified. Applications for recertification shall be made to the SBA Regional Office which made the original size determination. Applications for recertification shall be accompanied by a current completed SBA Form 355 (OMB No. 3245-0101) and by any other pertinent information necessary to show a significant change in its ownership, management, contractual relations, or in other factors bearing on its status as a small concern. If good cause is shown in extraordinary cases, as determined by the Presiding Judge of the Office of Hearings and Appeals, the original decision on the application for recertification may be made by the Presiding Judge.

(1) Recertification shall not be required nor will the prohibition against future self-certification apply if the adverse SBA size determination is based solely on a finding of affiliation due to a joint venture, e.g., ostensible subcontracting) limited to a particular Government procurement or property sale, or is based on an ineligible nonmanufacturer size determination on a particular Government procurement.

(2) If SBA makes a size determination denying an application for recertification, such adverse size determination may be appealed to the SBA Office of Hearings and Appeals. Recertifications have future effect only and, except as to timber sales size determinations, are not appealable by other than the concern in question (however, the concern's later self-certification on subsequent set-aside procurements or property sales may be protested in the usual manner.

(e) Size determinations for compliance purposes. Upon request by other Government agencies, SBA size determinations under Part 121 may be made to assist in the enforcement or administration of regulations or contracts, as well as in connection with award of contracts or grant-

ing of assistance. SBA size determinations are findings on the size status of a concern (including its affiliates) as of a definite time and regarding a specific applicable SBA standard, and do not rule on compliance, contractual or administrative matters which are handled by other agencies.

[49 FR 5029, Feb. 9, 1984; 49 FR 13676, Apr. 6, 1984]

§ 121.9 Protest of small business status.

(a) *How to protest*: Any bidder or offerer or other interested party may challenge the small business status of any other bidder or offeror on a particular Government procurement or sale. Such challenge shall be made by delivering a protest to the contracting officer responsible for the particular procurement or sale involved. In order to apply to the procurement or sale in question, such protest must be filed prior to the close of business on the 5th day, exclusive of Saturdays, Sundays, and legal holidays, after bid or proposal opening, except that in the case of negotiated procurements, a protest may be filed within 5 days exclusive of Saturdays, Sundays, and legal holidays after receipt from the contracting officer of notification of the identity of the offeror being protested. Such filing must be delivered to the contracting officer by hand, telegram, or mail within the 5-day period allotted: *Provided, however,* That a protest shall be considered timely if made by telephone to the contracting officer within the 5-day period allotted and the contracting officer thereafter receives a confirming letter (1) within such 5-day period or (2) postmarked no later than 1 day after the date of such telephone protest. Any contracting officer who receives a protest shall promptly forward such protest to the SBA regional office serving the geographical area in which the principal office of the protested concern, not including its affiliates, is located. A contracting officer may at any time after bid opening question the small business status of any bidder or offeror for the purpose of a particular

procurement or sale by filing a protest with the SBA regional office serving the area in which the principal office, not including its affiliates, is located. A protest by a contracting officer shall be timely for the purpose of the procurement or sale in question whether filed before or after award. A protest received after the time limits set forth herein shall not apply to the procurement or sale in question. A concern determined other than small business as a result of such late protest, however, shall be precluded from self-certification in any other procurement or sale in which the size standard is not higher than the standard in the procurement or sale in question. A protest must adequately set forth specific alleged grounds for the protest. A protest merely alleging that the protested concern is not small or affiliated with unspecified other concerns will not be deemed to adequately specify grounds for the protest. Evidence supporting the protest may be submitted therewith. Protests which do not set forth specific alleged grounds for the protest will be dismissed.

(b) *Notification of protest*: Upon receipt of such protest, the SBA regional director or his delegatee shall immediately notify the contracting officer and the protestant of the date such protest has been received and that the size of the concern being protested is being considered by SBA. The regional director or his delegatee shall also advise the protested bidder or offeror of the receipt of the protest and shall forward to the protested bidder or offeror a copy of the protest and a blank SBA Form 355, Application for Small Business Size Determination (OMB No. 3245-0101), by certified mail, return receipt requested. Such bidder must, within 3 working days after receipt of the copy of the protest and SBA Form 355 (OMB No. 3245-0101), file the completed form as directed by SBA, must attach thereto a statement in answer to the allegations of the letter of protest, together with evidence to support such position. If such bidder or

offeror does not submit the complete SBA Form 355 within the filing period provided above, or within any additional period of time granted by SBA for cause, SBA will rule the protested concern is other than a small business. If the bidder or offeror does not submit the completed SBA Form 355 (OMB No. 3245-0101) within the period provided above, or within any additional period of time provided by SBA upon application for good cause shown, SBA may assume that the disclosure of the Form or any missing part thereof would be contrary to the interests of the party failing to make such disclosure.

(c) Notification of determination: After receipt of a protest and responses thereto, SBA shall determine the small business status of the protested bidder or offeror and, by certified mail, return receipt requested, notify the contracting officer, the protestant, and the protested bidder or offeror of its decision within 10 working days, if possible.

(d) If SBA has determined that a concern is ineligible as a small business for the purpose of a particular procurement, it cannot thereafter become eligible for the purpose of such procurement by taking affirmative acts to constitute itself a small business.

(e) Multiple Award Schedules. Protests will be deemed timely if received by SBA at any time prior to the expiration of the contract period (including renewals) on a multiple award schedule procurement set aside for small business.

[49 FR 5029, Feb. 9, 1984; 49 FR 13676, Apr. 6, 1984]

§ 121.10 Size standards responsibilities.

(a) Office of Size Standards Staff, Office of the Administrator, shall:

(1) Develop and recommend small business size standards to the Administrator of SBA for promulgation.

(2) Consider and take appropriate action on written requests to change existing size standards or establish new size standards.

(3) Conduct industry hearings pertaining to size standards.

(4) Perform other related functions (e.g., industry studies) as may be appropriate to administer the SBA size standards program.

(b) Requests to change the existing, or establish new, size standards should be addressed to the Director, Size Standards Staff, Office of the Administrator 1441 L Street, NW., Washington, D.C. 20416, and should include information on the economic conditions and structure of the entire national industry, as well as specific reasons and justifications for the change or new size standard. The methodology described in the section on "Purpose and Method of Establishing Size Standards" (§ 121.1) provides basic criteria on the kinds of information desirable to make an appropriate request. If no size standard of an industry has been established in this part, then SBA, upon request, may issue a temporary size standard for the industry in question by appropriate publication of an interim emergency rule and subsequent notice and comment rulemaking in accordance with the Administrative Procedure Act.

(c) The Office of General Counsel, in conjunction with other interested SBA offices, shall develop and recommend to the Administrator regulations and procedures to assist in implementing the size standards.

(d) The SBA Size Policy Board shall consider and develop matters of size policy. It will consider and make recommendations relating to improvements in SBA regulations, procedures and directives concerning size matters.

(e) Pursuant to the provisions of § 121.11 of this part, the Office of Hearings and Appeals will review appeals

and make final decisions affirming, reversing or modifying:

(1) Determinations as to a concern's small business size status made pursuant to §§ 121.8 and 121.9 of this part (size determination); and

(2) Designations by contracting officers of the Standard Industrial Classification (SIC) industry into which the product or service is classified and/or the Small Business Administration size standard applicable thereto, for the purpose of Government procurements and sales made pursuant to §§ 121.5 and 121.6 (product or service classification).

§ 121.11 Procedure for size appeals.

(a) *Jurisdiction of Office of Hearings and Appeals.* The jurisdiction of the Office of Hearings and Appeals under this Part shall be limited, as specified in paragraphs (a)(1) and (2) of this section, to appeals from size determinations and product or service classifications. No appeal will be permitted from an informal opinion or advice concerning a company's future small business size status based on proposed but unexecuted changes in its organization, management, or contractual relations, or a small business size standard established by the Small Business Administration for a particular industry or field of operation, or any of the accompanying size regulations. The Office of Hearings and Appeals will review appeals and make final decisions pursuant to the provisions of paragraphs (b) through (w) of this section, affirming, reversing or modifying:

(1) Determinations as to a concern's small business size status made pursuant to §§ 121.8 and 121.9 of this part (size determination); and

(2) Classifications by contracting officers of the Standard Industrial Classification (SIC) Code and/or the Small

Business Administration (SBA) size standard applicable to a product or service for the purpose of Government procurements and sales made pursuant to §§ 121.5 and 121.6 of this part (product or service classification).

(b) *Definitions.* The following definitions shall apply to this section:

(1) "Person" means an individual, partnership, corporation or association.

(2) "Participant" means any part or person that makes a filing pursuant to this section. Except in the case of parties, participation in the proceeding may be limited at the discretion of the Presiding Judge.

(3) "Party" means the appellant, the concern whose size is at issue and all alleged affiliates of such concern that participate or are specifically afforded the opportunity to participate in the proceeding by the Presiding Judge, the contracting officer in a product or service classification appeal, and any other participant so designated at the discretion of the Presiding Judge. Parties will have full rights of participation in the proceeding and will be bound by the decision of the panel.

(c) *Who May Appeal.* Appeals from size determinations and product or service classifications may be filed with the Office of Hearings and Appeals by any of the following:

(1) Any interested person that has been adversely affected by a determination of a Regional Administrator, or his or her delegatee, or by the Associate Administrator for Finance and Investment made pursuant to § 121.8 of this part;

(2) Any interested person that has been adversely affected by a classification of a product or service by a contracting officer made pursuant to § 121.5 of this part; or

(3) The Small Business Administration Association Administrator for the Small Business Administration program involved.

(d) *Where to Appeal.* Written Notices of Appeal conforming to paragraph (f) of this section, may be mailed to the Office of Hearings and Appeals, Small Business Administration, Washington, D.C. 20416, or may be personally delivered to the Office of Hearings and Appeals at 2100 K Street, NW., Washington, D.C. A submission shall be deemed to be filed on the date it is mailed, as indicated by the postmark, or on the date it is personally delivered to the Office of Hearings and Appeals.

(e) *Time Limits for Appeal.* The following time limits will apply to appeals filed pursuant to this section.

(1) Except as provided in paragraph (e)(2) of this section, an appeal from a size determination shall be filed in writing no later than thirty (30) calendar days after the date of receipt of such determination;

(2) An appeal from a size determination concerning a bidder or offeror in a pending procurement or a pending Government property sale shall be filed in writing no later than five (5) days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of the determination made by a Regional Administrator, or his or her delegatee. Unless written notice of such an appeal is filed within the prescribed time limit, the appellant will be deemed to have waived all rights of appeal insofar as the pending procurement or sale is concerned, but the appeal may proceed to final determination and shall apply to future procurements and sales.

(3) An appeal from a product or service classification shall be filed no later than ten (10) days, exclusive of Saturdays, Sundays, and legal holidays, before the bid opening day or deadline for submitting proposals or quotations in cases when the bid opening day or deadline

for submiting proposals or quotations is more than thirty (30) days after the issuance of the invitation for bids or request for proposals or quotations. In cases where the bid opening day or deadline for submitting proposals or quotations is less than thirty (30) days after the issuance of the invitation for bids or request for proposals or quotations, the appeal shall be filed no later than five (5) days, exclusive of Saturdays, Sundays, and legal holidays, before the bid opening day or deadline for submitting proposals or quotations. An untimely appeal from a product or service classification will be dismissed.

(f) *Initiation of Appeal.* The document that initiates the appeal is hereafter called the Notice of Appeal. No particular form is prescribed for the Notice of Appeal. The appellant shall file the Notice of Appeal with the Office of Hearings and Appeals, in writing and in duplicate. In the case of telegraphic notices, a duplicate is not required; however, a telegraphic notice shall be confirmed by next day mailing of a written Notice, in duplicate. In accordance with paragraph (n) of this section, the Notice of Appeal shall be certified and a copy shall be concurrently served by the appellant upon those parties and persons specified in subparagraph (6) of this paragraph. Upon receipt of a copy of the Notice of Appeal, the Regional Office shall forthwith send the entire case file to the Office of Hearings and Appeals. The Notice of Appeal shall include the following information:

(1) Name, address and telephone number of the party filing the appeal, identification of the person to be contacted for service of correspondence, notices, orders, pleadings and request for information pertaining to the appeal.

(2) The substance and date of the size determination or product or service classification from which the appeal is taken, including identification of the concern whose size is being determined, or the SIC or SBA size standard being applied;

(3) If applicable, the invitation for bids or contract number and date and the name, address and telephone number of the contracting officer;

(4) A full and specific statement of the reasons why the size determination or product or service classification appealed is alleged to be erroneous;

(5) Presentation of arguments in support of such allegations; and

(6) A statement certifying that copies of the Notice of Appeal have been served upon the following, where applicable:

(i) The contracting officer;

(ii) The Small Business Administration official whose determination is appealed;

(iii) A protestant who is not the appellant;

(iv) The concern whose size status is at issue; and

(v) Any other identifiable interested person.

(g) *Notification of Filing of Appeal.* The Office of Hearings and Appeals will notify the parties and persons specified in paragraph (f) (6) of this section of the date it received the Notice of Appeal and the docket number assigned.

(h) *Scope of Appeal and Burden of Proof.* The Office of Hearings and Appeals will not consider issues not previously presented to the Small Business Administration official who made the size determination appealed unless such consideration is determined to be necessary to prevent manifest injustice to a party and such omission was not due to the fault of such party. The appellant shall have the burden of proof in the proceeding.

(i) *Statements of Interested Persons.* After a Notice of Appeal has been filed, any interested person may file

with the Office of Hearings and Appeals a signed statement, in duplicate, supporting or opposing the appeal and presenting appropriate argument and evidence. Such statement shall be filed no later than five (5) days, exclusive of Saturdays, Sundays, and holidays, after the receipt of the Notice of Appeal served pursuant to paragraph (f) of this section, and shall, in accordance with paragraph (n) of this section, be certified and concurrently served upon parties and persons specified in paragraph (f) (6) of this section.

(j) *Enforcement and Extensions of Time Limitations.* Time limitations on all filings will be strictly enforced. Unless requested by the Office of Hearings and Appeals, late filings not specifically provided for in this section, may be disregarded to avoid delay in disposing of the appeal. In the exercise of discretion and for good cause shown, the Presiding Judge may, after notice to all participants, waive any time limit set forth in this section, other than those time limits set forth in paragraph (e). A motion for an extension of time must be filed within the time period to which it applies.

(k) *Docket File.* Upon the receipt of a Notice of Appeal, the matter will be assigned a docket number. The docket file will consist of the Notice of Appeal, any responses thereto, the case file submitted by the Small Business Administration official, or any materials submitted by the contracting officer, including the related written determination of the official or officer, any additional pleadings, motions and other documents submitted pursuant to this section, unless not received into evidence by the Presiding Judge, the transcript or recording of any oral hearing or telephone conference, and any orders and decisions issued in the proceeding.

(l) *Public Access to Docket File.* The following rules will apply regarding public access to the docket file for a proceeding:

(1) Except as provided in paragraphs (l) (2) (3) of this section, the docket file will be available for public inspection in the Office of Hearings and Appeals during normal business hours and copies of such material may be obtained upon payment of the applicable charges.

(2) The following information in the docket file shall not be subject to public inspection or copying:

(i) Information subject to a protective order issued pursuant to paragraph (o) (2) of this section; and

(ii) Any proprietary information the withholding of which is provided pursuant to paragraph (n) of this section, or which is identified and contained in the case file submitted by the Small Business Administration official or the contracting officer.

(3) The case file submitted by the Small Business Administration official will be returned to such official upon termination of the proceeding.

(m) *Assignment of Three Judge Panel.* Upon receipt of a Notice of Appeal, the Assistant Administrator for the Office of Hearings and Appeals will assign the appeal to a panel of three Judges, one of whom (the Presiding Jupdge) will be designated to preside over the panel. The panel will have jurisdiction to investigate and decide the controversy and to take such further appropriate action as may be necessary to issue a decision in the matter in accordance with applicable agency policy precedent, and law. A decision agreed upon by a majority of the panel will be the final decision of the Small Business Administration.

(n) *Filing and Service of Pleadings.* The following rules will apply to all pleadings, motions and other documents filed pursuant to this section.

(1) Except as provided in paragraph (n) (2) of this section, all pleadings, motions, and other documents filed pursuant to this section shall be served upon the Presid-

ing Judge (once identified) and all other participants in the proceedings or their respective counsel or other representative in the proceeding, personally or by registered or certified mail, and shall be accompanied by certification of such service.

(2) Tax returns, confidential data on SBA Form 355 and any other evidence that constitutes proprietary information need not be served, so long as such deletions are identified and described in the copies served pursuant to this paragraph.

(3) All pleadings, motions and other documents filed pursuant to this section shall be signed by an authorized person, who shall certify as follows:

"I have read this document and, under 18 U.S.C. 1001, of which I am aware, I certify that, to the best of my knowledge, the statements made therein are true and correct, and that this document is not being filed for the purpose of delay or harassment."

(o) *Function of Presiding Judge.* The Presiding Judge of the panel to which the appeal is assigned is authorized to act upon and to dispose of all relevant motions, petitions, and other pleadings; to obtain such competent, material, and relevant facts as the Presiding Judge may deem necessary to a proper and just determination of the matters at issue, in an oral hearing or by other appropriate means (including, for example, telephone conferences); and to fix the time and place of any oral hearing or telephone conference. The Presiding Judge is also authorized to:

(1) Administer oaths and affirmations;

(2) Issue protective orders, and subpoenas as provided in paragraph (w) of this section;

(3) Request the attendance of Small Business Administration employees;

(4) Examine witnesses;

(5) Rule upon questions of procedure, evidence, policy and law, including the designation of party status in a proceeding and the nature and extent of participation for all other participants;

(6) Take or cause depositions to be taken;

(7) Regulate the course of the oral hearing, maintain decorum, and exclude from such hearing any person engaging in contumacious conduct or otherwise disrupting such hearing;

(8) Require the filing of memoranda and the presentation of oral argument with respect to any question upon which the Presiding Judge is required to rule during the course of the hearing;

(9) Hold conferences for the settlement or simplification of the issues or for other appropriate purposes;

(10) Dispose of procedural requests and similar matters;

(11) Take action and make decisions in conformity with the applicable law, policy, and procedures of the Small Business Administration;

(12) Act on motions to enlarge, modify, or delete issues in the proceeding; and

(13) Impose appropriate sanctions, if any party fails to comply with an order of the Presiding Judge, including but not limited to:

(i) Drawing an inference in favor of the requesting party regarding the information sought;

(ii) Prohibiting the party failing to comply with such order from intrducing evidence concerning, or otherwise relying upon, evidence relating to the information sought;

(iii) Permitting the requesting party to introduce secondary evidence concerning the information sought;

(iv) Striking any part of the pleadings of the party failing to comply with such request; or

(v) Taking such other appropriate action as is deemed necessary to serve the ends of justice.

(p) *Oral Hearings and Telephone Conferences.* The following rules will apply to oral hearings and telephone conferences:

(1) The Presiding Judge will determine the issues presented upon the documentary record. Only when the Presiding Judge determines, upon examination of the docket file and consideration of such additional facts as may be acquired on notice to participants, that there is a genuine dispute as to any material fact or decisional significance which cannot be resolved except by confrontation of witnesses, will an oral hearing be afforded.

(2) If the Presiding Judge determines that there is a matter that cannot be resolved other than by a telephone conference or an oral hearing, he or she will fix a time and place for such conference or hearing to resolve such matter.

(3) Any oral hearing will be set at a site reasonably proximate and convenient to the parties and those participants permitted to participate in the oral hearing by the Presiding Judge and notice thereof will set forth:

(i) A statement as to the purpose of the oral hearing; and

(ii) A statement as to the matters of fact and law involved and the issues that will be heard.

(4) The Office of Hearings and Appeals will provide a means for recording oral hearings and telephone conferences at which evidence is taken. A transcript or record, as applicable, may be obtained upon payment of the applicable charges.

(q) *Prohibited Ex Parte Communications.* Except to the extent required for the disposition of *ex parte* matters as authorized by law or regulation, no participant may consult a Judge on a fact or question of law at issue in an appeal except on notice and opportunity for all participants to participate.

(r) *The Record.* The following rules will apply to the record compiled in the proceeding:

(1) A transcript or recording of any testimony and exhibits, and any other documents included in the docket file pursuant to paragraph (r)(1) of this section shall constitute the exclusive record for decision. Where the decision is based on official notice of a material fact not appearing in the record, any participant may file a motion no later than five (5) days following receipt of the decision served pursuant to paragraph (u) of this section, advocating a contrary factual proposition and setting forth the factual or legal basis for the challenge.

(2) The record in a proceeding in which an oral hearing has been held will be closed by an announcement to that effect at such hearing by the Presiding Judge, when the taking of testimony has been concluded. When no oral hearing has been held, the Presiding Judge will inform the participants of the closing of the record by appropriate means. In the discretion of the Presiding Judge, the record may be closed as of a future specified date in order to permit the admission into the record of exhibits to be later prepared; *Provided* That the parties and other participants in the proceeding stipulate that they waive the opportunity to cross-examine or present evidence with respect to such exhibits. After the closing of the record, the transcript or recording of any testimony, together with all exhibits, will be certified by the Presiding Judge and filed in the docket file in the Office of Hearings and Appeals. A copy of such certification will be served on all participants in the proceeding.

(3) At any time during the course of the proceeding, or as directed by the Presiding Judge, but no later than five (5) days after receipt of notice of certification of the record made pursuant to paragraph (r)(2) of this section, any participant in the proceeding may file with the Presiding Judge a motion requesting the correction of a transcript, if any, which shall be accompanied by proof of service thereof upon all other participants in the proceeding. No later than five (5) days after the receipt of such a motion, other participants may file a response in support of, or in opposition to, such motion. Thereafter, the Presiding Judge will issue an order specifying the corrections to be made in the transcript. A copy of the order will be served upon all participants and will be made a part of the record. The Presiding Judge may, on his or her own motion, specify on notice to the participants corrections to be made in the transcript. Objection to any such proposed correction(s) shall be filed within three (3) days after receipt of such notice and such objection(s) will be the subject of appropriate rulings by the Presiding Judge.

(s) *Post-Hearing Procedures.* The following rules will apply to proposed findings and conclusions:

(1) After the conclusion of any oral hearing, any participant may, with the concurrence of the Presiding Judge, file proposed findings of fact and conclusions, briefs, and memoranda of law; *Provided*, That the Presiding Judge may, in any proceeding, direct any party to file proposed findings of fact and conclusions, briefs, and memoranda of law. Any proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within ten (10) days after receipt of notice of certification of the record pursuant to paragraph (r)(2) of this section, unless the Presiding Judge specifies otherwise.

(2) Proposed findings of fact shall be set forth in serially numbered paragraphs and shall set out with particularity all decisionally significant evidentiary facts

developed on the record that are deemed to support the findings proposed, with citations to the transcript, where appropriate, and to other portions of the record relied on for each evidentiary fact. Proposed conclusions shall also be separately stated in serially numbered paragraphs. Proposed findings and conclusions may be limited to those issues that affect the interests of their proponent and may be accompanied by supporting briefs.

(3) In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, and memoranda of law when directed to do so by the Presiding Judge, will be deemed to object to the findings and conclusions of the panel.

(t) *Decision.* Following receipt of proposed findings and conclusions authorized or directed pursuant to paragraph (s) of this section or default in the making of such filings, or upon closing of the record when such filings have not been authorized or directed, the Presiding Judge will prepare a proposed decision containing findings of fact and conclusions, as well as the reasons therefor, with respect to all the decisionally significant material issues of fact and law presented on the record. The proposed decision will also contain a proposed order, and the proposed sanction, relief, or denial thereof appropriate in the circumstances. The proposed decision will be circulated among the panel members for consideration and concurrence. Upon approval of that decision or a different decision by a majority of the panel, the decision will be issued; it shall be the final decision of the Small Business Administration and shall bind all parties to the proceeding.

(u) *Notice of Decision.* The Office of Hearings and Appeals will serve the decision upon all participants in the proceeding by certified mail. Where time is of the essence, notice of the ultimate determination may be communicated in a telegram or by telephone to the participants, to be followed by service of the full text.

(v) *Termination of Jurisdiction.* Except as provided in paragraphs (c)(1) and (v)(2) of this section, the authority of the panel over the proceeding shall cease upon issuance of the decision.

(1) Limited jurisdiction over the proceeding shall continue for the purpose of effecting certification, correcting the record and ruling on motions concerning official notice pursuant to paragraph (r) of this section.

(2) No later than thirty (30) days after service of the decision pursuant to paragraph (u) of this section, any participant may file a motion to reopen the proceeding for the limited purpose of presenting newly discovered evidence of decisional significance, together with a showing that such evidence was not available during the course of the proceeding, or could not have been available during that time upon the exercise of due diligence. The panel will dispose of such motion in such manner as to afford a just and proper disposition of the appeal.

(w) *Subpoenas.* The following rules will apply to subpoenas:

(1) Subpoenas will be authorized at the discretion of the Presiding Judge only with respect to oral hearings held pursuant to paragraph (p) of this section. No subpoenas may be issued against Small Business Administration personnel or for documents in the custody or control of the Small Business Administration.

(2) Subpoenas requiring the attendance and testimony of witnesses, and subpoenas requiring the production of any books, papers, records, contracts, agreements, and other documents relating to an appeal under this section shall be signed and issued by the Presiding Judge.

(3) Unless submitted on the record while an oral hearing is in progress, requests for a subpoena *ad testificandum* shall be submitted in writing, identifying the person to be subpoenaed and showing the relevance, ma-

teriality, and the basis for requiring the testimony of such person.

(4) Written requests for a subpoena *duces tecum* shall be verified, and shall specify with particularity the books, papers, and documents desired and the facts expected to be proved thereby. A showing shall also be made as to the relevance and materiality of the evidence sought.

(5) Requests for subpoenas shall be submitted by a party in triplicate, and may be made *ex parte*.

(6) Any person or entity against whom a subpoena is directed may, prior to the return date, filed with the Presiding Judge a motion to quash or limit the subpoena, setting forth the reasons the subpoena should not be complied with or should be limited in scope. That motion must be made upon notice to all other parties in the proceeding.

(7) Notice, including a brief statement of the reasons therefor, will be given the denial, in whole or in part, of a request for subpoena or of a motion to quash.

(8) A subpoena may be served by any person who is not a party to or participant in the proceeding and who is not less than 18 years of age.

(9) Service of a subpoena upon the person named therein shall be made by exhibiting the original subpoena to such person, by reading the original subpoena if such person is unable to read, by delivering the duplicate subpoena to such person, and by tendering the fees for one day's attendance at the proceeding to which such person is summoned and the mileage allowed by law. If the subpoena is issued on behalf of the United States or an officer or agency thereof, attendance fees and mileage need not be tendered, but will be paid upon filing of an appropriate claim therefor.

(10) The person effecting service of a subpoena shall sign an affidavit thereof, stating the date, time, and manner of service.

(11) In case of failure to make service, the reasons for the failure shall be stated on the original subpoena by the person who attempted to make service.

(12) The original subpoena, bearing or accompanied by the required affidavit or statement, shall be returned forthwith to the Office of Hearings and Appeals or, if so directed on the subpoena, to the Presiding Judge before whom the person named in the subpoena is required to appear.

(13) The attendance of witnesses and the production of documentary evidence may be required from any place in the United States to any designated place of hearing. In case of disobedience of a subpoena, the Small Business Administration may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(14) Witnesses who are subpoenaed and respond thereto are entitled to the same fees, including mileage, as are paid for like service in the courts of the United States. Fees shall be paid by the party at whose instance the subpoena is issued.

(15) In the exercise of discretion, the Presiding Judge authorizing and issuing any subpoena will, upon request or upon his or her own motion, devise and provide such protective order(s) as may be necessary and appropriate to protect the witness and/or such books, documents, materials, and records produced in response thereto, from harassment, undue expense, breach of confidentiality of information and data reasonably concluded to require protection from general disclosure, or for any other proper and relevant consideration.

(x) *Delegation of Authority When Judge Not Available.* In the event of the absence or unavailability of the Presiding Judge or other member of the panel to which the appeal is assigned, where such action is necessary,

any Judge in the Office of Hearings and Appeals to whom such authority is delegated, is authorized to participate in rendering a final decision and to dispose of any motions or other interlocutory matters, as appropriate, pertaining to such appeal.

(y) *Effective Date.* This section shall apply to all appeals for which a decision has not been made by the Size Appeals Board as of December 23, 1983.

[49 FR 5029, Feb. 9, 1984; 49 FR 13676, Apr. 6, 1984, as amended at 49 FR 50027, Dec. 26, 1984]